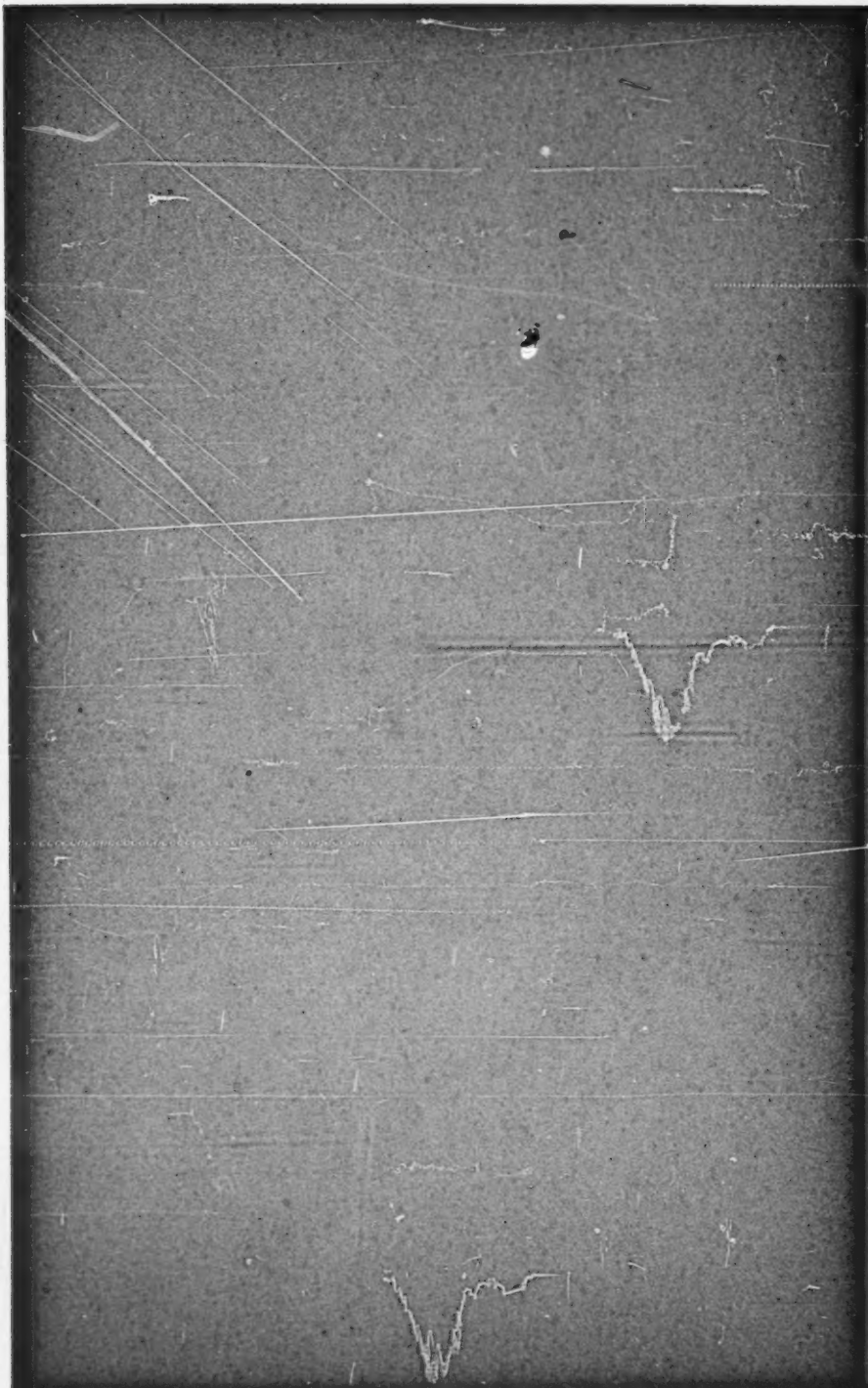

SUPREME COURT, U. S.
MAY 4 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1511

ALAN D. MILLER, M.D., individually and as Commissioner of the New York State Department of Mental Hygiene and LAWRENCE P. ROBERTS, M.D., individually and as Director of Harlem Valley State Hospital,

Petitioners,

—against—

RITA B[illegible] DALE, a former incompetent person,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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ALAN D. MILLER, M.S., individually and as Commissioner of the New York State Department of Mental Hygiene and LAWRENCE P. ROBERTS, M.D., individually and as Director of Harlem Valley State Hospital,

Petitioners,

—against—

RITA HOOPER DALE, a former incompetent person,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners seek review of the judgment of the United States Court of Appeals for the Second Circuit in the case of *Dale* v. *Hahn, et al.*, which affirmed a judgment of the United States District Court for the Southern District of New York. This judgment of the Court of Appeals, on September 24, 1973, was upon rehearing, adhered to by the Court of Appeals on January 9, 1974.

Counsel for respondent received a copy of the petition for a writ of *certiorari* on April 4, 1974.

Questions Presented

Where a person was adjudicated mentally incompetent, with neither personal notice nor knowledge, and had all her assets, as a consequence of that adjudication, taken from her control and put under the control of "committees" which spent them primarily for the "committees' " fees and costs of involuntary hospital confinement:

(1) Did the District Court have jurisdiction in a 1983 action to examine the compliance with due process in "committee" appointment and incompetence adjudication?

(2) Could the respondent recover her assets from those who caused their loss, by authorizing the adjudication of incompetency, without personal knowledge or notice to respondent?

(3) Was this suit barred by either official or sovereign immunity?

(4) Were the state court accountings, where neither petitioner nor respondent were present, notified, nor parties, *res judicata* as to the constitutionality of payment of money by respondent's "committee"?

Statement of the Case

In 1951, respondent was involuntarily committed, as an alcoholic, to a state mental hospital. She was duly discharged on April 18, 1967. Prior to commitment, and immediately upon discharge, respondent was and is employed as a bookkeeper/secretary with responsibility for funds management and accounting. Respondent has never squandered or wasted any of her assets, all of which were prudently invested. From 1951 until 1962, while she was a patient, respondent prudently managed her business affairs without the assistance of a committee.

In 1962, in order to facilitate payment to the Department of Mental Hygiene of amounts claimed to be due for services and treatment allegedly rendered to respondent, the hospital director (petitioner Roberts) petitioned a state court for an order declaring respondent to be incompetent and appointing a committee to manage her affairs. Respondent did not receive personal notice of that petition; she was given no opportunity to retain counsel, to appear and be heard in opposition to the petition, or to cross-examine and submit evidence of her competence. This was the normal procedure usually, if not always, followed by petitioners in such situations.

The petition was granted without a hearing and Demarest J. Hahn was appointed committee. On February 1, 1966, petitioner Miller was appointed Commissioner of the New York State Department of Mental Hygiene. On October 13, 1966, Hahn was allowed to resign as committee and on April 10, 1967, defendant Pious was appointed successor committee. Again, respondent received no notice of the

proceeding or opportunity to be heard. Had she been given such opportunity she could have informed the court that she was scheduled to be discharged within one week and that the appointment of a successor committee was entirely unnecessary.

The committees disbursed approximately $7,992.92 of respondent's assets. Approximately $5,668.16 was paid to the Department of Mental Hygiene, of which petitioner Miller is the Commissioner. Approximately $2,306.76 was paid (or was claimed to be due) as committee commissions, bond premiums, legal expenses and other expenses, all of which were occasioned solely because respondent's property was managed not by respondent but by a committee. Except for the acts of petitioners, no committee would have been appointed for respondent. Respondent has never been found by any jury to be mentally ill, incompetent, or unable adequately to conduct her personal or business affairs.

Respondent is now 72 years of age. Her estate was diminished by $2,306.76 above and beyond what she would have been obligated to pay had there been no committee. That, plus disbursements of $5,693.16 to the Department of Mental Hygiene, results in a total expenditure of almost $8,000.00, which is approximately 86% of the total principal ($9,283.32) at the time her committee was first appointed, and approximately 56% of the total of the principal and income $14,856.10) earned from that time to the present.

ARGUMENT

POINT I

The District Court Had Jurisdiction to Review the Validity of Personal Service of the Notice Upon Respondent in the State Court Incompetency Proceeding.

28 U.S.C. §1343(c) confers upon the United States District Courts original jurisdiction of any civil action seeking to redress the deprivation under color of state law of any right, privilege or immunity secured by the Constitution of the United States. It is clearly established that the right to adequate notice is of constitutional dimensions. *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 315 (1950); *Covey* v. *Town of Somers*, 351 U.S. 141, 146 (1956); *Snidach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Boddie* v. *Connecticut*, 401 U.S. 371, 380-81 (1971); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *In re Gault*, 387 U.S. 1, 31-34 (1967).

Defendant cites *Chaloner* v. *Sherman*, 242 U.S. 455 (1917) in support of its contention that the District Court lacked jurisdiction over the subject matter of this action. *Chaloner* is inapposite. In *Chaloner* the court found that the service of process was *adequate*. In the case at hand, the District Court judge made a finding of fact that the service of process was not calculated, under the circumstances, to apprise Mrs. Dale of the pendency of the relevant state court proceedings. Where service of process is inadequate, collateral attack on the judgment is permitted because the prior proceeding is void. *City of New York* v. *New York, New Haven & Hartford R. Co.*, 344 U.S. 293 (1953); *Hans-*

berry v. *Lee*, 311 U.S. 32 (1940); and *Pennoyer* v. *Neff*, 95 U.S. 714 (1877).

Petitioners challenge the finding of fact by the district judge that the service of process was inadequate. The Circuit Court of Appeals for the Second Circuit reviewed the record and concluded that the findings of fact were supported by the record. There is no reason for this court to further investigate the factual support for this finding.

Petitioners are barred from now claiming that the District Court lacked jurisdiction to entertain respondent's claim. The Court of Appeals for the Second Circuit on an earlier appeal held that the District Court had such jurisdiction, and remanded the case to the latter court. *Dale* v. *Hahn*, 440 F.2d 633 (2d Cir. 1971). This holding, from which petitioners then sought no review here, constituted the law of the case. *Wharton* v. *Hirsch*, 348 F.2d 906 (2d Cir. 1965).

Respondent obtained no class action relief, and no State law or regulation was struck down. One solitary, elderly woman was held entitled to recover the sum of $2,306.76, plus interest, from petitioners. With all due respect, this is not the kind of case warranting review by the Supreme Court of the United States.

POINT II

Respondent Was Entitled to Recover From Petitioners Due to Their Involvement in the Unconstitutional Appointment of the Initial Committee and the Successor Committee of Respondent's Person and Property.

Petitioner Roberts signed the petition for the initial appointment of respondent's Committee. As petitioner in the state court proceedings, Roberts may be held for the inadequate service of process on Mrs. Dale. Having failed to fulfill his duty to respondent Dale, petitioner Roberts is liable "for the natural consequences of his actions." *Monroe* v. *Pape,* 365 U.S. 167, 187 (1961).

Petitioner Miller was appointed Commissioner of the New York State Department of Mental Hygiene during the operation of respondent Dale's first Committee. He did nothing to change the procedures by which committees were appointed, although he knew or should have known that the procedures effected an unconstitutional deprivation of property on the patients in hospitals operated by the State of New York. During petitioner Miller's tenure, respondent's first committee resigned and a second committee was appointed. Respondent received no notice of the proceeding to appoint this successor committee. Accordingly, petitioner Miller is also liable for the damages suffered by respondent due to the unconstitutional appointment of a committee of her person and property.

Because both of the petitioners, respectively, were involved in the injury to respondent, they fall outside the policy considerations which protect officials whose names

routinely appear on documents because of bureaucratic considerations. The cases of *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nomine, Oswald* v. *Sostre*, 404 U.S. 1049, 405 U.S. 978 (1972) and *Johnson* v. *Glick*, 481 F.2d 1028 (2d Cir. 1973) are factually inapposite.

Petitioners have not shown that there is any conflict between the decision below and other decisions, either of other circuits or of the Second Circuit. The panel of the Court of Appeals below implicitly found no conflict between its decision and others of the same court.

POINT III

Recovery Was Not Barred by the Doctrine of Official Immunity.

The recent decision by this Court in *Scheuer* v. *Rhodes*, —— U.S. ——; 42 U.S.L.W. 4543 (Nos. 72-914 and 72-1318, April 16, 1974) clearly establishes that the United States Court of Appeals for the Second Circuit was correct in deciding that the petitioners herein were not protected by the doctrine of official immunity. The statement by Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U.S. 378, 397-98 (1932), quoted with approval in *Scheuer*, eloquently substantiates the decision in the case at hand:

> If this extreme position [absolute official immunity] could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the state may at any

> time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overriden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression (42 U.S.L.W. at 4548).

The Court of Appeals here on an earlier appeal carefully balanced the competing interests (diligent administration of state government versus the protection of individual rights), since enunciated by *Scheuer,* and concluded that "This lack of immunity should not seriously hamper the diligent administration of New York's Mental Hygiene Law, the latter factor being a consideration which in our estimation does not outweigh the policy of the Civil Rights Acts." *Dale* v. *Hahn,* 440 F.2d 633, 638 (2d Cir. 1971). Because this determination was based upon the policy considerations announced in *Scheuer* and involved an essentially factual determination, it is not the kind of issue which merits this Court's consideration on a Petition for Writ of Certiorari.

In any event, petitioners are barred from raising this point now. In the earlier appeal in the proceedings below, the Court of Appeals decided against petitioners (*Dale* v. *Hahn,* 440 F.2d 633 (2d Cir. 1971)). No appeal was sought in this Court challenging such decision. The law of the case

bars petitioners from attempting at this late date to have review of this issue. *Wharton* v. *Hirsch*, 348 F.2d 906 (2d Cir. 1965).

POINT IV

Recovery Was Not Barred by the Doctrine of Sovereign Immunity.

It is clear that " . . . damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office." *Scheuer* v. *Rhodes*, —— U.S. ——; 42 U.S.L.W. 4543, 4545 (Nos. 72-914 and 72-1318, April 16, 1974). As in *Scheuer*, respondent here sought and was awarded damages against the named defendants personally and individually for the deprivation of her federal rights by the defendants acting under color of state law. Petitioners have made no showing that this modest award "must be paid from public funds in the State treasury—" (*Edelman* v. *Jordan*, —— U.S. ——, 42 U.S.L.W. 4419, 4422 (No. 72-1410; March 25, 1974)). Thus, the reliance by appellants on *Edelman* v. *Jordan, supra; Rothstein* v. *Wyman*, 467 F.2d 226, 236-37 (2d Cir. 1972), *cert. den.* 411 U.S. 921 (1973); and *Williams* v. *Eaton*, 443 F.2d 422, 429 (10th Cir. 1971), is misplaced.

Another distinction is that respondent below was permitted to recover for amounts of her *own* funds taken from her. This contrasts sharply with cases like *Edelman* v. *Jordan, supra*, where the issue was the right to obtain *retroactive* recovery of *benefits* never paid.

POINT V

The State Court Proceedings Were Not *Res Judicata* and Did Not Bar This Action.

The initial order of the state court appointing a committee for respondent was void *ab initio,* due to the inadequacy of service of process on respondent.

The state court accountings were not *res judicata* for five reasons:

A. Petitioners Miller and Roberts were not parties or privies to either of the state court accountings, and they were not bound by the judgments. *Gass* v. *Department of Mental Hygiene,* 22 A.D.2d 329, 255 N.Y.S.2d 314, 316 (4th Dept. 1965). The doctrine of *res judicata* operates only to bar subsequent suits between the parties or privies to the original action, *Lawlor* v. *National Screen Corp.,* 349 U.S. 322, 326 (1955); *E. B. Elliot Advertising Co.* v. *Metropolitan Dade County,* 425 F.2d 1141 (5th Cir. 1970).

B. The state court lacked jurisdiction to consider the issues raised in the Federal action since it was confined within the context of an accounting proceeding. *In re Asker,* 284 A.D. 712, 134 N.Y.S.2d 685 (4th Dept. 1954), *aff'd* 309 N.Y. 983 (1956); *In re Bendheim,* 187 Misc. 372, 66 N.Y.S.2d 445 (Sup. Ct. Orange Co. 1946). In fact, the accounting proceeding in New York is not even adversarial. No one sues or is sued. Because respondent was precluded under state law from raising her constitutional claims in the state court accountings, *res judicata* could not bar the present suit. See *Exhibitors Poster Exchange* v. *National Screen Service Corp.,* 421 F.2d 1313 (5th Cir. 1970).

C. The causes of action in the state court accountings differed significantly from the cause of action in the instant proceedings. The only issues raised in the accountings were whether the committees *in fact* received and expended for the benefit of the incompetent the monies which they claimed to have received and spent and whether they performed services warranting payment of a commission. *In re Battery*, 260 A.D. 362, 22 N.Y.S.2d 655 (4th Dept. 1940); New York Mental Hygiene Law, §110. The instant proceeding challenged the constitutionality of the proceedings leading to appointment of the committee. The proof required in the state court accountings is clearly completely different than the proof required in the instant case. Because the causes of action, both on their face and with respect to the proof required, are quite different, *res judicata* is not applicable. *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591 (1947); *Fishgold* v. *Sullivan Corp.*, 328 U.S. 275, 282-83 (1946); *N. Y. Electric and Gas* v. *Public Service Comm.*, 102 F.2d 453 (2d Cir. 1939); Von Moschzicker, Res Judicata, 38 Yale L.J. 299 (1948).

D. The state court accountings were void and were therefore not valid judgments. District Judge Knapp found that respondent had not received notice of the proceedings to declare her an incompetent and appoint a committee. Absent personal notice, the state courts did not have *in personam* jurisdiction to enter valid judgments binding on the respondent. Since the state court proceedings were, as Judge Knapp ruled, void *ab initio*, they cannot be *res judicata*. *Hansberry* v. *Lee*, 311 U.S. 32, 40-41 (1940).

E. The second accounting cannot be *res judicata* because appellants Miller and Roberts signed a written stipulation on February 3, 1970 agreeing that settlement of Mr. Pious'

account would not bar respondent from seeking to recover in this action amounts paid to them for the costs of her alleged care and treatment.

Appellants rely very heavily in their Petition for Writ of Certiorari on the fact that respondent was represented at the accountings by a guardian *ad litem*. The fact of representation is entirely irrelevant on the *res judicata* issue.

Finally, as respondent pointed out below, petitioners failed to raise this point as an affirmative defense, properly pleaded and proved in the District Court.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be denied.

Dated: New York, New York
May 1, 1974

Respectfully submitted,

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